Vol 3
FED 4 1941
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 745.

THE UNION TRUST COMPANY OF PITTSBURGH,
Trustee, JOHN MARSHALL LOCKHART
TRUST NO. 2, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

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INDEX.

PAGE

Petition for Writ of Certiorari 1

Summary Statement of the Matter Involved ... 2

Jurisdiction 4

Question Presented 4

Reasons for Granting the Writ 5

Prayer 6

Brief in Support of Petition for Certiorari 7

I. Opinions Below 7

II. Jurisdiction 7

III. Statutes and Regulations Involved 7

IV. Statement of the Case 7

V. Specification of Errors Intended to be Urged 8

VI. Argument 9

Appendix 17

Citations.

CASES:

Bonfils, F. G., Trust v. Commissioner, 40 B. T. A. 1085, ... Fed. (2) Page 14

Burnet v. Whitehouse, 283 U. S. 148 9

Helvering v. Pardee, 290 U. S. 365 9

Irwin v. Gavit, 268 U. S. 161 9

Magill Taxable Income 383 ..... 13, 15

Yale Law Journal, 49-1496 14

STATUTES:

Revenue Act of 1932, Sections 162(a), 162(b) C. 209, 47 Stat. 169 ..... Appendix 17

TREASURY REGULATIONS 77:

Article 861 ..... Appendix 17

Article 862 ..... Appendix 18

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, The Union Trust Company of Pittsburgh, Trustee, John Marshall Lockhart Trust No. 2, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals entered in the above entitled cause on September 27, 1940, following which petition for rehearing was filed on October 25, 1940, and was denied by the Circuit Court of Appeals for the Third Circuit on November 7, 1940.

Summary Statement of the Matter Involved.

The relevant facts, as stipulated by the parties (R. 176-189), disclosed by the trust instrument together with amendments thereto (R. 36-67), and as found by the Board of Tax Appeals, may be summarized as follows:

On December 28, 1922, John Marshall Lockhart established a trust *inter vivos* naming The Union Trust Company of Pittsburgh trustee. Pursuant to the terms of the trust instrument, Mr. Lockhart transferred property to the trustee having a market value on January 1, 1923, of $1,411,350.

Under the provisions of the trust instrument, as amended, the trustee was required to collect the income from the trust property and dispose of all of such income each year by (a) the payment of commissions, attorneys' fees, and expenses, (b) the payment of $500 monthly to seven named individual beneficiaries, making a total of $42,000 annually, and (c) the payment of the balance of said income to or for the permanent and exclusive benefit of The Western Penna. Hospital of Pittsburgh, Pennsylvania, a charitable institution and recognized as such by the Commissioner of Internal Revenue.

The instrument further provides that as the payments to the individual beneficiaries terminate by death (two of these have now terminated by death, reducing from $42,000 to $30,000 the income to be distributed annually to individual beneficiaries), this income also becomes payable to The Western Penna. Hospital of Pittsburgh. Thus, ultimately, the entire income of the trust fund will inure to the benefit of and be paid to the hospital.

In a subsequent paragraph of the trust instrument, it is provided that: "In the event that the income of said

trust fund shall not in any year be sufficient * * *" to pay the amounts that the trustee was directed to distribute to each individual beneficiary out of income, the trustee is authorized and directed to withdraw from the principal such amount as may be necessary to supply the deficiency. The income has at all times since the creation of the trust been sufficient to make the payments provided for the individual beneficiaries leaving a balance payable to the hospital, and consequently the trustee has never had authority to pay over any part of the principal to such individual beneficiaries and neither have the individual beneficiaries had any right or claim to any part of the corpus. During the eleven-year period from 1923 through 1933 the ordinary net income of the trust amounted to $904,926.73, not including $254,701.25 capital gains (R. 186). Of this $904,926.73 of ordinary net income, $462,000.00 was currently distributed to the individual beneficiaries and the balance of $442,926.73 was paid to or permanently set aside for the hospital.

In its income tax returns filed for the calendar years 1932 and 1933, the trustee deducted from its taxable income, under the provisions of section 162(b) of the Revenue Act of 1932, the distributions of income, totalling $42,000, made in each of those years to the seven individual beneficiaries. The income so distributed was returned by the individual beneficiaries and all tax due thereon was paid by them. The Commissioner determined that the amounts distributed to the individual beneficiaries were taxable to the trust and accordingly determined deficiencies in tax against the trustee for 1932 and 1933. The United States Board of Tax Appeals in a memorandum opinion rendered by a Division consisting of one member of the Board, and not reviewed by the Board, sustained the Commissioner without deciding whether the individual beneficiaries held a charge against the corpus of the trust fund. The Circuit Court

of Appeals for the Third Circuit affirmed the decision of the Board, pointing out that the "case lies in the field of an especially puzzling problem" and stating that the "responsibility" for the relief asked by petitioner "lies elsewhere."

Under the determination of the Commissioner, all taxes assessed and paid at any time come out of the income which would otherwise be paid to or be permanently set aside for the benefit of The Western Penna. Hospital.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on September 27, 1940, and Petition for Rehearing was denied on November 7, 1940. This Court has jurisdiction to review by virtue of the Internal Revenue Code, Section 1141(a), 26 U. S. C. A. Section 1141(a) and Section 240(a) of the Judicial Code, as amended, (28 U. S. C. A. § 347(a)). This petition, the annexed brief, and the record have been filed within the time prescribed by the Act of February 13, 1925, c. 229, § 8, 43 Stat. 940, 28 U. S. C. A. § 350.

Question Presented.

Where by the provisions of a trust instrument the trustee is directed to collect the income from the trust estate and distribute all such income annually, partly in specified amounts to individuals named and the balance thereof to or for the use of a charitable corporation which is the sole residuary beneficiary of the trust, is the tax on that portion of such income distributed to the individual beneficiaries, and otherwise payable by the individual beneficiaries, made a tax payable by the trustee and deductible from income otherwise payable to the charitable corporation by reason of a subsequent provi-

sion in the trust instrument directing the trustee to supplement, by withdrawals from principal, the income so distributed to the individual beneficiaries if such income in any year should not equal the amounts specified in the trust instrument?

Reasons for Granting the Writ.

1. The issue here presented involves an important question of Federal law that has not been passed upon by this Court.

2. The decision of the Board of Tax Appeals in this case as affirmed by the Circuit Court of Appeals for the Third Circuit is in direct conflict with Section 162(b) of the Revenue Act of 1932. It is in conflict with the rule laid down by this Court in *Irwin v. Gavit,* 268 U. S. 161, and erroneously extends the principles found applicable in the cases of *Burnet v. Whitehouse,* 283 U. S. 148 and *Helvering v. Pardee,* 290 U. S. 365. The Board of Tax Appeals and the Circuit Court of Appeals for the Third Circuit failed entirely to recognize the fact that a gift, devise or bequest need not be solely either of income or of principal, but may consist partly of both, and that a gift that by the whole tenor of the instrument is a gift of income does not lose its character as such because there is a contingent supplementary or additional gift of principal.

3. This Court should review this case in order to remove confusion existing in the lower courts with respect to the proper application of Section 162(b) of the Revenue Act of 1932 and the corresponding section in the Internal Revenue Code, in order to prevent recurring litigation on this subject, and in order to declare the principles of taxation applicable in case of gifts of both income and principal.

4. The decision of the lower court in this case results in an injustice erroneously imposed upon a charitable corporation which will require a decision of this Court to rectify.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari be issued out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Circuit to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed; and that petitioner be granted such other and further relief as may be proper.

And your petitioner will ever pray, etc.

THE UNION TRUST COMPANY OF PITTSBURGH,
TRUSTEE, JOHN MARSHALL LOCKHART TRUST
NO. 2.

By J. MERRILL WRIGHT,
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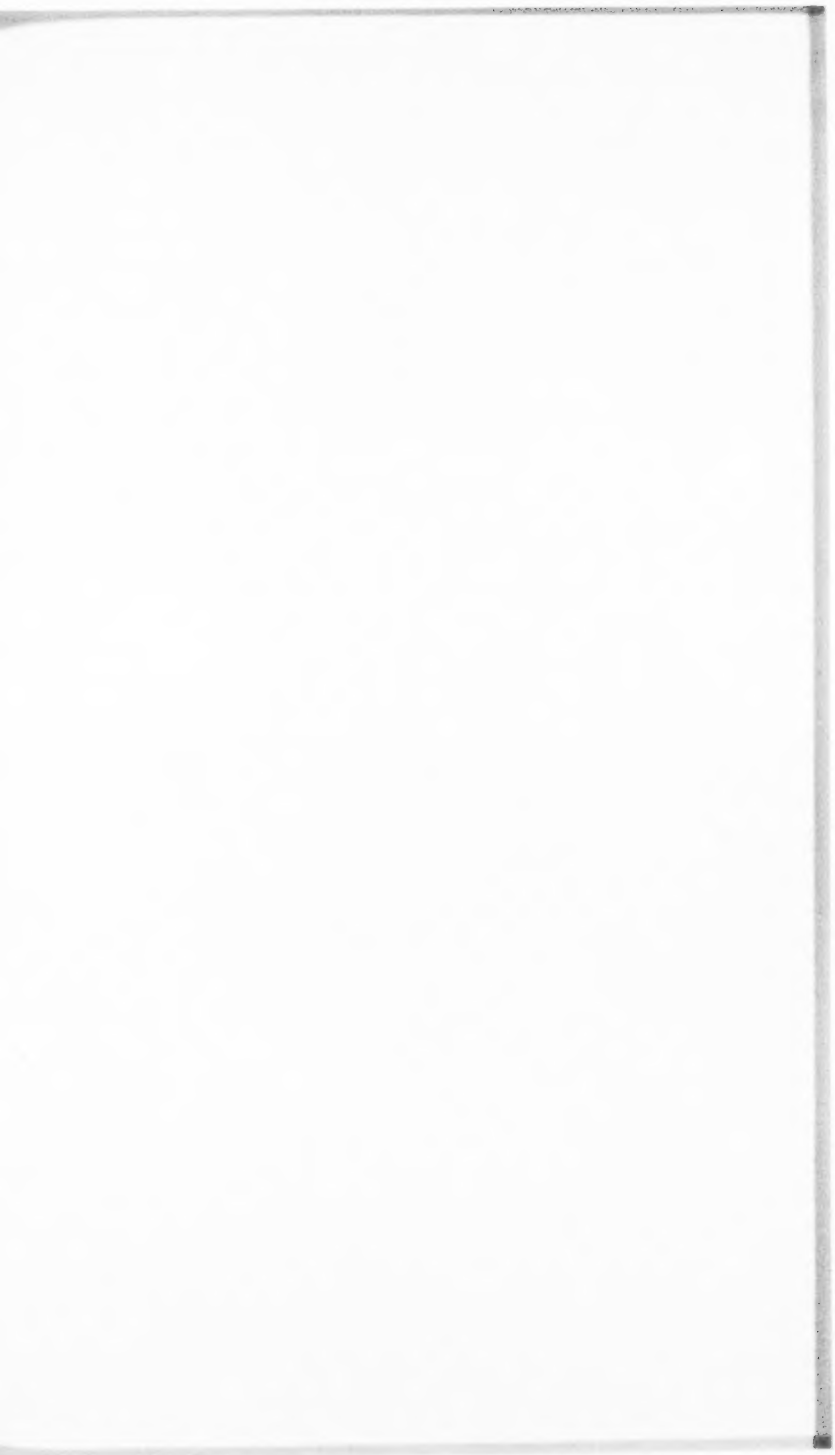

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 129) is a Memorandum Opinion and, therefore, is not officially reported. The opinion of the Circuit Court of Appeals (Clark, Circuit Judge), is reported in 115 F. (2d) 86.

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the petition.

III.

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 17-19.

IV.

Statement of the Case.

A statement of the essential facts of the case is included in the petition.

V.

Specification of Errors Intended to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the individual beneficiaries received trust income as such which constituted taxable income to them and an allowable deduction to the trust.

2. In failing to hold, in accordance with the facts, that the income currently distributed to the individual beneficiaries belonged to them from the moment of its receipt by the trust and was taxable to them.

3. In failing to hold that a gift or bequest of income does not lose its character as such by reason of being coupled with a contingent additional or supplementary gift of principal or corpus.

4. In failing to hold that the trust was entitled to the deduction claimed under the explicit and mandatory provisions of section 162(b) of the Revenue Act of 1932 providing that "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries * * *."

5. In holding that the trust income currently distributed to the individual beneficiaries was taxable to the trust.

6. In affirming the decision of the United States Board of Tax Appeals.

VI.

Argument.

In *Irwin v. Gavit,* 268 U. S. 161 (1925), the rule enunciated by this Court is to the effect that where an instrument makes a gift, bequest or legacy of income to an individual beneficiary, such income is deductible to the trust and taxable to the individual.

In *Burnet v. Whitehouse,* 283 U. S. 148, (1931), this Court had before it for consideration the will of James Gordon Bennett containing the following bequest:

> "Item 'Tenth. I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars.' "

In *Helvering v. Pardee,* 290 U. S. 365, (1933), the will of Calvin Pardee under consideration by this Court contained a similar bequest as follows:

> "I also give unto my said wife an annuity of Fifty thousand Dollars ($50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments."

In these two cases, *Burnet v. Whitehouse,* supra, and *Helvering v. Pardee,* supra, this Court held that the sums received by the individual beneficiaries under the instrument "were not gifts to be derived from and paid out of income," and that the payments must be regarded as "not distribution of income; but in discharge of a gift or legacy" and, therefore, taxable to the trustee and not to the beneficiaries.

In the *Gavit* case, it was clear that the individual beneficiaries held no charge against corpus and that

the bequest was a bequest of income which was properly taxable to the beneficiaries.

In the *Whitehouse* and *Pardee* cases, it was equally clear that the bequests in question were not bequests of income and were not distributions of income but were absolute and unconditional bequests made in the ordinary form of bequests creating an immediately existing charge upon the whole estate payable without reference to the existence or absence of income by the fiduciary. By the terms of the instruments themselves, the bequests were not a part of the income to be distributed by the fiduciary. They were rather in the nature of debts payable before the fiduciary should distribute income to the remaining beneficiaries.

The decisions in the *Gavit* case and in the *Whitehouse* and *Pardee* cases are not in conflict. The former relates to liability for tax in the case of distribution of income. The latter relate to liability for tax in the event of a general bequest or legacy. In neither case was there involved an instrument wherein the income distributed by the fiduciary to the beneficiaries might upon the occurrence of a future contingency be supplemented by an additional gift of principal, a case requiring the application of the combined rules laid down in the *Gavit, Whitehouse* and *Pardee* cases.

The instant case is such a case. The whole tenor of the trust instrument executed by John Marshall Lockhart revolves around the collecton and distribution of "income" by the trustee. The trustee is directed to receive and collect all the income of the trust estate and to distribute all such income annually, a part to individual beneficiaries and the balance to or for the use of a charity hospital. The trustee has carried out the provisions of the trust instrument, has collected the in-

come from the estate each year and has distributed such income among the beneficiaries named. In 1932 and 1933, the years involved in this case, the individual beneficiaries paid income tax upon the income received by them where tax was due.

In a subsequent paragraph of the trust instrument, it is provided that in the event that the income available for distribution by the trustees should not be sufficient in any year to pay the amounts that the trustee was directed to pay out of income to the individual beneficiaries, the trustee should withdraw from corpus and pay to the individual beneficiaries sufficient sums to make up the deficiency in such designated amounts. The income has at all times been sufficient, and the trustee has never had occasion to exercise the authority and direction so given. However, it is by reason of this provision that the Commissioner determined in this case that the income which the trustee has been collecting and distributing to the individual beneficiaries year after year has not been income distributed as income. Such a determination is in conflict with the whole tenor of the trust instrument and with the facts. Income collected and distributed as income does not cease to be income because there may be an additional or supplementary gift from principal. In the instant case, it is clear that the individual beneficiaries have never had any claim or charge against corpus and that the trustee has never had the right or power to invade corpus on their behalf. It is clear that only if, as and when, a deficiency in income may occur that a charge against corpus will arise in favor of the individual beneficiaries and that charge will only be for the amount of the deficiency. We submit that until that condition precedent occurs, the trust instrument makes a gift of income and only of income, to which any conditional additional gift of corpus or principal is purely supplementary. The principle gov-

erning the court below was stated in its opinion as follows:

> "The telling phrase used by writers on the law for such a provision is 'threat of corpus invasion.'"

The authority cited for the principle is 49 Yale Law Journal 1496. This is not the test applied by the Supreme Court. As pointed out above, the test under the *Gavit* and *Pardee* cases relates to whether or not there is a distribution of income to the individual beneficiary or the payment of a general legacy.

It is respectfully submitted that under no principle of logic, law or economics could a threat of corpus invasion to supply a partial deficiency in income—which remains a threat only and must so remain until a specified event occurs—change the character of a gift of such income into a gift of principal. Because the test is lacking in sound reason, it seems to be an utterly unsatisfactory guide both from the point of view of the government and the taxpayer.

The indisputable fact, disclosed by the express terms of the trust instrument, is that the individual beneficiaries have never had a right to, charge against, or claim for any part of the corpus, and the trustee has never possessed the slightest right or power to pay over any part of the corpus to or for the benefit of the individual beneficiaries. Under the explicit terms of the trust instrument, the individual beneficiaries will never have any such right, claim, or charge, and the trustee will never have any such right or power unless and until the event established by the instrument—deficiency in income—as a condition precedent occurs, and then such right, claim, or charge will extend only to the amount of such deficiency.

While the United States Circuit Court of Appeals for the Third Circuit in affirming the Board of Tax Appeals in this case held strictly to the principle of "threat of corpus invasion", yet Clark, Circuit Judge, seems to recognize a defect in the universal application of that principle. In his opinion, he states:

> "Under the ruling in the Whitehouse case, the taxability of the trustee became immediately important. To permit him a deduction for income distributed would leave the income entirely untaxed. In Helvering v. Pardee, 290 U. S. 356, the Supreme Court closed the gap by denying the deduction. It is into this closed gap that petitioner, a trustee to pay annuities and administer a charitable trust of the remainder, now seeks an entrance. If it is to be reopened, the responsibility lies elsewhere.
>
> The Supreme Court will have to be convinced of the analogy between the cognate sections 162 (a) and (b). In interpreting sub-section (a) several of the lower Federal Courts have acknowledged reality and 'have allowed the deduction where the expectancy of an ample, continuing income dispels the threat of invasion, and have denied it where the margin is narrow and the prospects uncertain'. A finding of such analogy would put an end to the criticism, a criticism that has taken two forms. First:
>
> > 'A test of income has been adopted which is not the common understanding of the term, nor even the actual source of the payment, but rather the remotely possible source.'
> >
> > Magill, Taxable Income 383
>
> Second:
>
> > 'One more device for tax avoidance has has been set up because the settlor, by inserting in the trust instrument a power to invade

corpus (even though the prospect of invasion is remote) shifts the burden of taxation to a trustee; multiplication of trusts reduces surtax rates.'

The Power to Invade Corpus in Federal Income Taxation of Trusts, 49 Yale Law Journal 1496, 1499 (note)."

An example of the logical contradiction to which the rule of thumb use of "threat of corpus invasion" leads is illustrated by the case of the *F. G. Bonfils Trust,* 40 B. T. A. 1085, affirmed by the Circuit Court of Appeals for the Tenth Circuit on November 6th, 1940, ... Fed. (2) Page ...., not yet reported.

The will in the case of F. G. Bonfils Trust contained provisions similar to that of the trust instrument in the instant case, and the Circuit Court of Appeals for the Tenth Circuit affirmed the decision of the Board of Tax Appeals, which allowed the deduction provided for in Section 162(a) of the Statute on the ground that "* * * the evidence established beyond a reasonable doubt that there never will be any recourse to the corpus to pay annuities, and that the corpus was, in fact, permanently set aside in the taxable years for charitable purposes.", and yet denied the deduction provided in Section 162(b) for income distributed to the beneficiaries under the identical factual situation because of the so-called "Threat of corpus invasion".

What the Court below has failed to recognize is that there can be, and in the instant case is, a gift of income coupled with a contingent additional or supplementary gift of principal. Such a conclusion is the only logical conclusion from the trust instrument in this case, and insofar as the amount paid to the beneficiary constitutes a distribution of income, such income should be

taxed to the beneficiary. Insofar as the amount paid to a beneficiary constituted a withdrawal from principal (if that event should ever occur), the beneficiary should not be taxed for the amount so withdrawn from principal. Such a principle of taxation is not novel. It is the ordinary and usual method of accounting. It is the principle applied to distribution between life tenant and remainderman where the intact value of the estate is being considered. It is the principle applied by the Commissioner in the taxing of dividends where the question arises as to whether the dividends were paid out of earnings or out of capital. Distribution under the trust in this case is strikingly analogous to payment of dividends by a corporation and taxability to the beneficiary should depend upon whether and to what extent the distribution (dividend) represents a payment out of earnings and not a withdrawal of principal. It is the principle that should be applied to the trust instrument in this case for the following reasons:

(1) It corresponds with the facts, and conforms in letter and in principle to the provisions of Sec. 162(b) of the Revenue Act of 1932.

(2) It is the logical, economic and accounting principle most properly applicable to the trust estate.

(3) It puts an end to the criticism quoted by Clark, Circuit Judge, in his opinion in this case that:

> "A test of income has been adopted which is not the common understanding of the term, nor even the actual source of the payment, but rather the remotely possible source.
> Magill, Taxable Income 383."

(4) It corresponds to administrative procedure in analogous cases and constitutes a satisfactory and

workable basis for both the taxpayer and the government.

(5) All the taxable income of the trust would be taxed and the one who received the income as the owner of the beneficial interest would pay the tax.

Conclusion.

It is, therefore, respectfully submitted that for the reasons stated this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE UNION TRUST COMPANY OF PITTSBURGH, TRUSTEE, JOHN MARSHALL LOCKHART TRUST No. 2,

By J. MERRILL WRIGHT,
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ROBERT A. RUNDLE,
J. STANTON CARSON,
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APPENDIX.

Statute and Regulations Involved.

Revenue Act of 1932:

"SEC. 162. NET INCOME.

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit;

"(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *"

Treasury Regulations 77, relating to the Revenue Act of 1932:

"Art. 861. ESTATES AND TRUSTS.—In general, the income of a trust for the taxable year which is

to be distributed to the beneficiaries must be returned by and will be taxed to the respective beneficiaries, but the income of a trust which is to be accumulated or held for future distribution, whether consisting of ordinary income or gain from the sale of assets included in the corpus of the trust, must be returned by and will be taxed to the trustee. The exception to this general rule is with respect to the income of a trust revocable by the grantor, and the income of a trust which may be distributed to the grantor or used to pay the premiums upon policies of insurance on his life, which income, whether or not distributed, must be returned by and will be taxed to the grantor of the trust. (See sections 166 and 167 and article 881.)

"See section 142 and articles 741-746 with reference to fiduciary returns, and section 24 and articles 281-284 with reference to items not deductible. (See also article 154.)

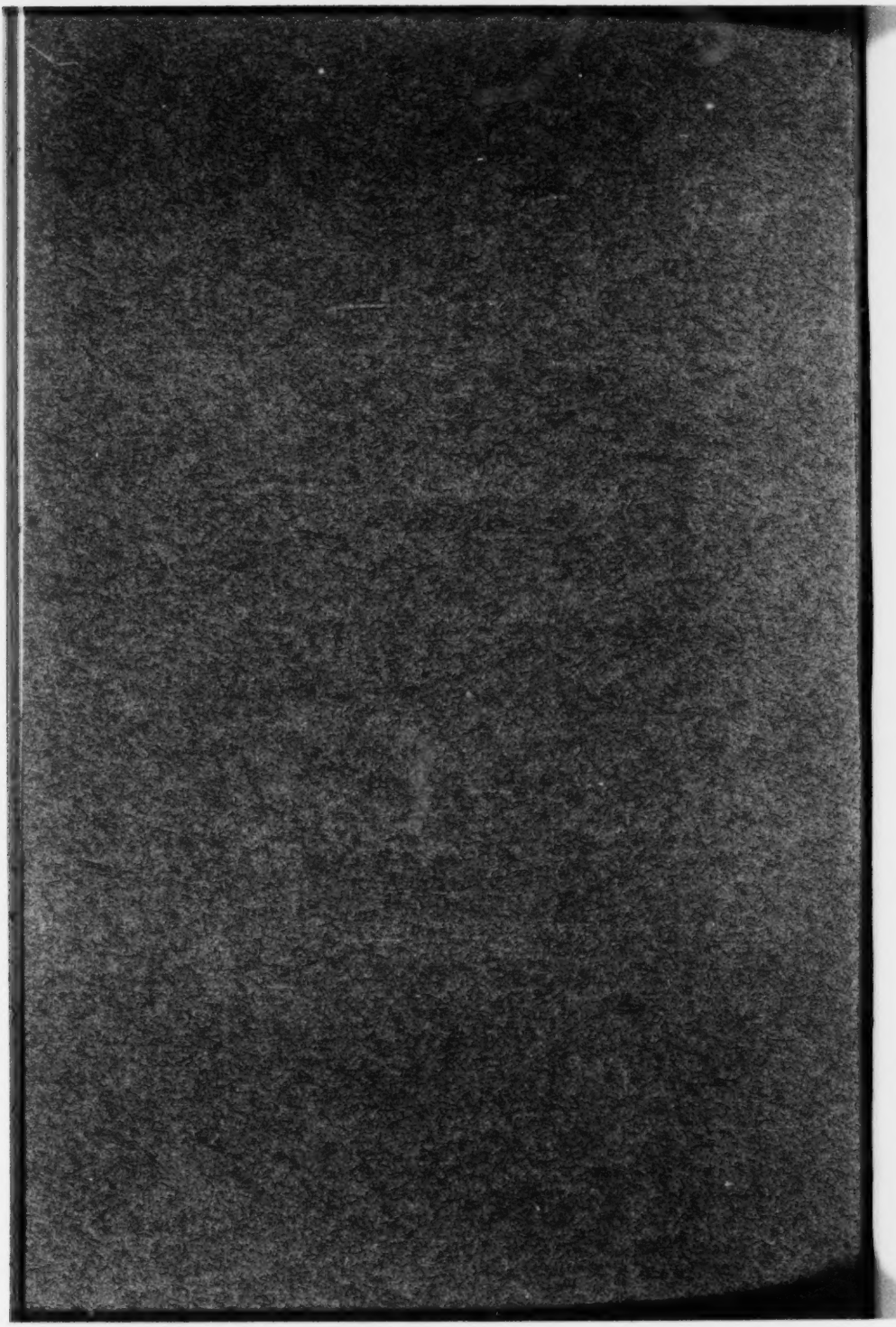
"Art. 862. METHOD OF COMPUTATION OF NET INCOME AND TAX.—The Act provides that the tax computed upon the net income of the estate or trust shall be paid by the fiduciary, except as provided in sections 166 and 167. (See article 881.) However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be), those specified in sections 23, 119, 213, and 251 in the case of individuals:

"(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes, as specified in section 23(n), or (b) be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establish-

ment, acquisition, maintenance, or operation of a public cemetery not operated for profit, such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by section 23(n).

"(2) The amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, shall be allowed as an additional deduction in computing the net income of the estate or trust. The amount so allowed as a deduction must be included by the beneficiaries in computing their net income, whether distributed to them or not. If the taxable year of the beneficiary differs from that of the estate or trust, the amount which he is required to include in computing his net income shall be based upon the income of the estate or trust for its taxable year ending within his taxable year. The amounts which are allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) of this article in any taxable year.

"(3) Income received by the estate of a deceased person during the period of administration or settlement of the estate, and income of a trust which may in the discretion of the fiduciary be either distributed to the beneficiary or accumulated, is allowable as an additional deduction in computing the net income of the estate or trust for its taxable year to the amount thereof properly paid or credited during such year to any legatee, heir, or beneficiary. Any amount so allowed as a deduction shall be included by a legatee, heir, or beneficiary in computing his net income."



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	5

CITATIONS

Cases:

Boston Safe Deposit & T. Co. v. *Commissioner*, 66 F. (2d) 179, certiorari denied, 290 U. S. 700	5
Burnet v. *Whitehouse*, 283 U. S. 148	4
Helvering v. *Pardee*, reported *sub nom. Helvering* v. *Butterworth*, 290 U. S. 365	4
Union Trust Co. v. *Commissioner*, 111 F. (2d) 60, certiorari denied, October 14, 1940, present Term	5
Warner v. *Commissioner*, 66 F. (2d) 403, certiorari denied, 290 U. S. 688	5

Statute:

Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 162	2

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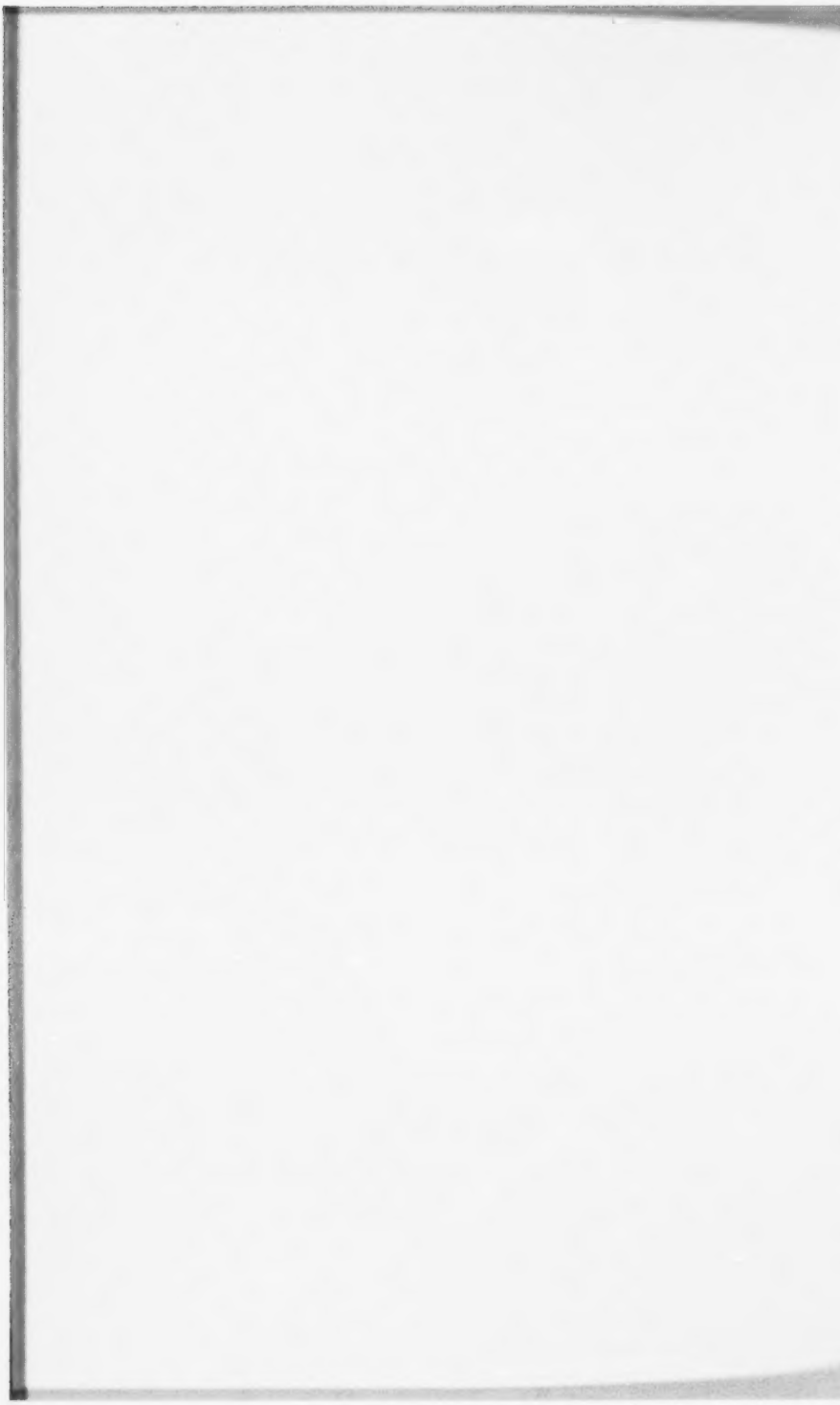

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 745

THE UNION TRUST COMPANY OF PITTSBURGH, TRUSTEE, JOHN MARSHALL LOCKHART, TRUST NO. 2, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 129–131) is unreported. The opinion of the Circuit Court of Appeals (R. 195–199) is reported in 115 F. (2d) 86.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 27, 1940 (R. 200). The

petition for rehearing was denied on November 7, 1940 (R. 214). The petition for a writ of certiorari was filed on February 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A trust instrument called for the payment of annuities of $6,000 to each of seven individuals. The trustee had the power to invade the corpus if necessary in order to meet the payments. This necessity has never arisen, since the income has always been sufficient. The question presented is whether the payments are deductible for income-tax purposes from the income of the trust under Section 162 (b) of the Revenue Act of 1932.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 162. NET INCOME.
>
> The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> * * * * *
>
> (b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the

amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

STATEMENT

In 1922, John Marshall Lockhart created a trust, appointing The Union Trust Company of Pittsburg as trustee. The trust instrument called for the payment of $500 per month to each of seven named individuals for their lives. Accordingly, during the taxable year involved herein the trustee paid a total of $42,000 to these persons (R. 129–130).

The trustee was expressly authorized to withdraw from principal any sums required to augment the annual income of the trust so that the annuities could be paid in all events (R. 130). It was agreed between the parties that the total net income of the trust for the year 1932 was $138,325.61 (R. 178), and for the year 1933 was $117,792.49 (R. 185). Since the creation of the trust the income has always been sufficient to enable the trustee to pay the annuities without resorting to the corpus

(R. 130). The surplus income was paid to or set aside for a charitable institution (R. 177–178, 184–185).

From 1923 through 1931 the petitioner deducted the $42,000 paid to the individual beneficiaries in each year, and the beneficiaries paid income taxes on the sums received (R. 180, 187). In connection with the petitioner's returns for 1932 and 1933, the Commissioner determined that the petitioner was not entitled to deduct the $42,000 paid on account of the annuities, and asserted deficiencies (R. 129). The Board of Tax Appeals held that the Commissioner's determination was correct (R. 131), and the Circuit Court of Appeals affirmed (R. 200).

ARGUMENT

The decision of the court below that the distributions to the beneficiaries under the trust were payments of annuities and therefore not deductible by the estate is in accord with the applicable decisions of this Court. The annuities are gifts, payable in any event, and, if necessary, from the corpus. Such annuities are not taxable to the recipient (*Burnet* v. *Whitehouse,* 283 U. S. 148), and cannot be deducted by the trustee, even though they are paid out of income. *Helvering* v. *Pardee,* reported *sub nom. Helvering* v. *Butterworth,* 290 U. S. 365, 370–371.

The present case falls squarely within the principle established by those decisions. The settlor directed that the annuities should be paid out of trust

income, but, if the income was insufficient, the deficiency was to be made up out of the corpus (R. 130). It is clear that the annuities were not dependent upon the realization of income, but were payable in any event out of corpus. In these circumstances, the distributions, even though actually made from income, are not deductible. The facts herein are indistinguishable from *Union Trust Co.* v. *Commissioner,* 111 F. (2d) 60 (C. A. A. 7th), in which this Court denied certiorari on October 14, 1940, No. 105, present Term. See also *Boston Safe Deposit & T. Co.* v. *Commissioner,* 66 F. (2d) 179 (C. A. A. 1st), certiorari denied, 290 U. S. 700; *Warner* v. *Commissioner,* 66 F. (2d) 403 (C. A. A. 2nd), certiorari denied, 290 U. S. 688.

CONCLUSION

The decision below is in accord with the decisions of this Court and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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FEBRUARY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941